In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ALLAN RAY KING

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 9–10) is not yet reported. The opinions of the district court (App. C, *infra*, pp. 11–17; App. D, *infra*, pp. 19–20) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 10a) was entered on March 21, 1973. By order of April 13, 1973, Chief Justice Burger extended the time for filing a petition for a writ of certiorari to

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and including April 30, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether under the amended Criminal Appeals Act (18 U.S.C. 3731), which provides that the United States may appeal to the court of appeals from a decision of a district court dismissing an indictment "except * * * where the double jeopardy clause of the United States Constitution prohibits further prosecution," no appeal lies if the district court considers evidence beyond the face of the indictment, in ruling on a pre-trial motion to dismiss, before a jury has been empanalled or a non-jury trial begun, so that no jeopardy has attached.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *.

Title 18 U.S.C. 3731, as amended, 84 Stat. 1890, provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evi-

dence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

On October 19, 1971, a grand jury in the United States District Court for the Southern District of West Virginia returned an indictment charging respondent, Allen Ray King, with willfully failing to report for induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a). Prior to trial, King moved to dismiss the indictment on the ground that the local board's denial of his claim for classification as a conscientious objector was improper, and that the order to report for induction was therefore invalid. The district court granted the motion (App. D, *infra*, pp. 19–20), and the United States appealed to the court of appeals under the Criminal Appeals Act, 18 U.S.C.

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3731, as amended by the Omnibus Crime Control Act of 1970, 84 Stat. 1890, The court of appeals dismissed the appeal on the ground that it lacked jurisdiction, holding that the Act does not "encompass appeals from a decision reached by going beyond the 'face of the record'" (App. A, *infra*, p. 9).

1. The material facts are not in dispute. King registered with his local board on March 29, 1968, and shortly thereafter made a claim for conscientious objector status. On July 15, 1968, the local board denied the claim without any stated reasons. King was notified of his I–A classification, and was advised of his right to a personal appearance before the local board and of his right of appeal to the State Appeal Board. He failed to exercise either right, and was subsequently ordered to report for induction. The present indictment followed his failure to report for induction as ordered (App. C, *infra*, p. 12).

2. Prior to trial, King moved to dismiss the indictment pursuant to Rule 12(b)(1), Fed. R. Crim. P., on the ground, *inter alia*, that the local board's failure to state reasons for the denial of his conscientious objector claim invalidated his I–A classification and his subsequent order for induction. The district court denied the motion to dismiss in a Memorandum Opinion and Order filed March 16, 1972, holding that, after reviewing King's Selective Service file, it was not persuaded that he had presented a *prima facie* case for conscientious objector status; and even assuming, *arguendo*, that he had, his failure to exhaust his administrative remedies precluded any claim of prej-

udice as a result of the local board's failure to state its reasons for denying his claim (*McGee* v. *United States*, 402 U.S. 479; App. C, *infra*, pp. 11–18).

Prior to trial King renewed his motion to dismiss the indictment in light of a recent post-*McGee* opinion of the Court of Appeals for the Fourth Circuit (*United States* v. *Davis*, 460 F. 2d 792). The district court granted the motion, and dismissed the indictment in a Memorandum Order of July 11, 1972, holding that *Davis* required it to find that the local board's failure to state reasons for denying the conscientious objector classification was improper, and that the order to report for induction was invalid (App. D, *infra*, pp. 19–20).[1]

3. The government filed a timely notice of appeal to the court of appeals, pursuant to 18 U.S.C. 3731, seeking review of the district court's determination that King had been improperly denied a conscientious objector classification. The court of appeals, however, held that Section 3731, which authorizes an appeal to the court of appeals, from "a decision, judgment, or order of a district court dismissing an indictment * * * except * * * where the double jeopardy clause of the United States Constitution prohibits further prosecution," did not authorize an appeal from the pretrial dismissal of the indictment here. The court of appeals held that Section 3731 did not confer jurisdiction to hear an appeal from a pretrial dismissal of an

[1] The district court did not allude to its initial alternative finding that King had not established a *prima facie* case for a conscientious objector classification.

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indictment that rests not upon the sufficiency of the indictment alone, but upon the facts outside the indictment (App. A, *infra*, p. 10):

> 18 U.S.C. § 3731 is the source of any jurisdiction this Court has of criminal appeals by the United States. Its scope is narrow and does not encompass appeals from a decision reached by going beyond the "face of the record." *United States* v. *Sisson*, 399 U.S. 267, 281 (1970). The decision here involved further inquiry than the sufficiency of the indictment on its face. After reviewing the Selective Service file the District Court made findings essential to its decision. While termed a dismissal of the indictment, it was in reality a summary judgment of acquittal. A similar result was so characterized in *United States* v. *Findley*, 439 F. 2d 970 (1st Cir. 1971), which found that result unappealable by the United States under 18 U.S.C. § 3731. We agree with the reasoning of that court.

REASONS FOR GRANTING THE WRIT

We have set forth in detail the reasons the granting the writ here in our petition for certiorari in *United States* v. *Rothfelder*,[2] which we are filing contemporaneously to seek review of a similar decision by the Court of Appeals for the Sixth Circuit. *Rothfelder* presents the same issue of statutory construction raised here, as well as a related issue involving the application of the Double Jeopardy Clause. These cases, as we have

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[2] We are furnishing copies of our petition in *Rothfelder* to the respondent herein.

shown in the *Rothfelder* petition, raise an important issue of statutory construction involving the Criminal Appeals Act, 18 U.S.C. 3731, the principal jurisdictional statute governing appeals by the government in criminal cases. The construction placed on the Act by the court below deprives the United States of the right to appeal from a wide variety of pretrial orders dismissing indictments which do not turn on "the sufficiency of the indictment alone," but involve the application of legal principles to generally undisputed or stipulated facts. The limitation engrafted by the court of appeals on the broad language of Section 3731 is contrary to the expressed intent of Congress in amending Section 3731 to permit appeals in cases such as this. These considerations, as we have shown, along with a developing conflict among the courts of appeals as to the effect of the 1971 amendments to the Criminal Appeals Act, warrant the granting of the petition for certiorari here. Since the statutory issue raised here and in *United States* v. *Rothfelder,* is the same, the Court may wish to delay the disposition of this petition pending the hearing and determination of *Rothfelder,* which also presents the related Double Jeopardy question.

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CONCLUSION

The petition for the writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
HENRY E. PETERSON,
Assistant Attorney General.
ROBERT L. KEUCH,
THADDEUS B. HODGDON,
Attorneys.

APRIL 1973.

APPENDIX A

United States Court of Appeals
For the Fourth Circuit

No. 72-2213

UNITED STATES OF AMERICA, APPELLANT

v.

ALLEN RAY KING, APPELLEE

Appeal from the United States District Court for the Southern District of West Virginia. DENNIS RAYMOND KNAPP, District Judge

Argued February 8, 1973—Decided March 21, 1973

Before HAYNSWORTH, Chief Judge, BUTZNER, Circuit Judge, and BRYAN, District Judge.

Wayne A. Rich, Jr., Assistant United States Attorney (John A. Field, III, United States Attorney, on brief) for Appellant; James M. Brown [court-appointed counsel] for Appellee.

PER CURIAM.

The defendant was indicted for violation of the Universal Military Training and Service Act, 50 U.S.C. App. § 462, in that he failed to report for induction after having been ordered to do so. He moved to dismiss the indictment on the grounds that (1) he was entitled to classification as a conscientious objector and thus exempt from induction, and (2) the local board's I-A classification of him was invalid for failure of that board to state its reasons for denying him conscientious objector status. The District Court re-

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viewed the Selective Service file of the defendant to determine whether the defendant had made out a *prima facie* case of entitlement to a conscientious objector classification. It determined that he had, and that the local board had failed to state reasons for its denial of his application. Reasoning, under *United States* v. *Broyles*, 423 F. 2d 1299 (4th Cir. 1970), that this was fatal to a prosecution such as the instant one, the District Court dismissed the indictment. The United States appeals.

We conclude that the order of dismissal is not appealable by the United States and that the appeal must be dismissed.

18 U.S.C. § 3731 is the source of any jurisdiction this Court has of criminal appeals by the United States. Its scope is narrow and does not encompass appeals from a decision reached by going beyond the "face of the record." *United States* v. *Sisson*, 399 U.S. 267, 281 (1970). The decision here involved further inquiry than the sufficiency of the indictment on its face. After reviewing the Selective Service file the District Court made findings essential to its decision. While termed a dismissal of the indictment, it was in reality a summary judgment of acquittal. A similar result was so characterized in *United States* v. *Findley*, 439 F. 2d 970 (1st Cir. 1971), which found that result unappealable by the United States under 18 U.S.C. § 3731. We agree with the reasoning of that court.

Accordingly we do not reach the merits of the appeal and for want of jurisdiction the appeal is DISMISSED.

Appendix B

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-2213

United States of America,

Appellant,

vs.

Allen Ray King,

Appellee.

APPEAL FROM the United States District Court for the District of West Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal is dismissed for want of jurisdiction.

FILED

MAR 21 1973

WILLIAM K. SLATE, II
CLERK

William K. Slate II

CLERK

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APPENDIX B

[Filed, March 21, 1973, Samuel W. Phillips, clerk.]

United States Court of Appeals for the Fourth Circuit

No. 71-2213

UNITED STATES, APPELLANT

v.

ALLEN RAY KING

Judgment

Appeal from the United States District Court for the Southern District of West Virginia

This cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that appeal from the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, dismissed.

SAMUEL W. PHILLIPS,
Clerk.

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APPENDIX C

United States District Court, Southern District of West Virginia, Beckley

Criminal No. 71-8

UNITED STATES OF AMERICA

v.

ALLEN RAY KING

MEMORANDUM OPINION AND ORDER

Defendant was indicted for a violation of the Universal Military Training Act for refusing to report for, and submit to, induction into the Armed Forces of the United States. On January 25, 1972, defendant filed his Motion to Dismiss based on three grounds. A hearing was held on February 9, 1972, in Beckley, West Virginia, at which time counsel presented arguments to the Court.

With regard to the first asserted ground for dismissal, i.e., that the indictment fails to state facts sufficient to constitute an offense against the United States, the Court is of the opinion that the indictment meets the requirements of the Federal Rules of Criminal Procedure and adequately charges the defendant with an offense under the Universal Military Training and Service Act. Item No. 2 of defendant's motion is a matter for determination at a trial on the merits.

There remains for determination by the court the issue raised by the third ground asserted by defendant in his motion. It is defendant's contention that having presented a prima facie claim for conscientious

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objector status, the Draft Board's failure to state any reasons for denying said classification renders defendant's classification I–A, and subsequent order of induction invalid. In effect what defendant is saying is that it is obligatory on the Local Board to set out the reasons for its rejection of registrant's claim for conscientious objector status once he has made a prima facie showing of entitlement, and that failure so to do at the time of classification of the registrant I–A fixes his rights as of that very day; and that any subsequent order based thereon is invalid and unenforceable. In other words, defendant asserts it is not necessary to appeal an improper classification at the administrative level, but that one may rely on the deficiency of the Local Board and avoid the effect of any order entered thereon.

The undisputed facts as determined from the record may be briefly summarized as follows:

On April 10, 1968, defendant registered with Local Board No. 3 in Fayetteville, West Virginia. On April 22, 1968, he submitted SSS Form 150 by which he claimed conscientious objector status. On June 12, 1968, by a regular form notice Local Board 3 required the defendant to appear in person, and on June 17, 1968, he appeared before the Board in person. On July 15 of that year he was classified I–A and mailed a Form SSS 110 notifying him of his classification. He was also sent SSS Form 217, which form advised him of his right to a personal appearance and appeal within 30 days. The 30 days elapsed with defendant taking no action to appeal his classification. Moreover, defendant has never asked for an appeal of his classification. The Local Board in denying his conscientious objector status failed to give the reason therefor.

Thus, the Court is presented with the question of whether or not defendant made out a prima facie case

to be classified as a conscientious objector, and if so, whether failure of the Local Board to state the reasons for rejection of conscientious objector status is fatal to the indictment.

The Court must first determine whether or not the defendant has established a prima facie case of entitlement to conscientious objector status. On this issue the court has examined Government's Exhibit No. 1, the Selective Service file of the defendant, including, but not limited to, the SSS Form 150.

The Court is aware that formal membership in a religious organization is not a prerequisite to conscientious objector classification, *U.S.* v. *Seeger,* 38 U.S. 163 (1965). Moreover, the court is aware also of the fact that it must construe the facts in a way most favorable to a registrant in determining whether the defendant had submitted sufficient information to his Local Board to constitute a prima facie case for conscientious objector status. *U.S.* v. *James,* 417 F.2d 826 (4th Cir. 1969). In light of the dearth of information submitted by the defendant to his Local Board, the court is not persuaded that the defendant has in fact presented a prima facie case for conscientious objector status.

Even assuming, arguendo, that the defendant has in fact established a prima facie case of entitlement to conscientious objector status, the court is not convinced that in this particular case the failure of the Local Board to cite reasons for its denying the defendant a conscientious objector classification is fatal to the indictment.

Counsel for the defendant cites three recent Fourth Circuit cases, *U.S.* v. *Broyles,* 423 F.2d 1299 (4th Cir. 1970), *O'Brien* v. *Resor,* 423 F.2d 594 (4th Cir. 1970), and *U.S.* v. *James,* supra.

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The government does not believe it necessary to outline in detail the facts and holdings of each of the foregoing cases. In each case an indictment was returned against an individual who refused induction into the armed services. In addition, the Local Boards had failed to state reasons for their refusal to classify the defendants as conscientious objectors. Each defendant appealed his classification. At no time, however, during the appellate procedure were the records of the various Boards supplemented by the assignment of reasons for rejection of conscientious objector status; and the record thus remained deficient upon exhaustion of administrative remedies. The Fourth Circuit held in each instance that where a defendant is convicted for refusing to submit for induction after having established a selective service prima facie entitlement to conscientious objector classification, orders classifying him as I-A and ordering him to report for induction without any statement by the Selective Service Boards as to the basis of their decision, are invalid.

The government believes the aforesaid Fourth Circuit cases to be factually distinguishable from the case at bar in one vital aspect—the defendant in the case at bar did not appeal his denial of conscientious objector classification to the State Appeal Board. In other words, the defendant failed to exhaust his administrative remedies even though he was clearly advised of his right thereto.

Subsequent to the Fourth Circuit cases, hereinbefore cited, the Supreme Court, in *McGee* v. *U.S.*, 402 U.S. 479 (1970), distinguished those cases wherein a registrant should be required to exhaust administrative remedies from those instances in which it would not be necessary. In *McGee* v. *U.S.*, supra, McGee had, in 1966, applied for conscientious objector status

to his local Selective Service Board, which Board advised him that his claim would be passed on when a student deferment expired. His Board was informed in 1967 that he had been accepted for a graduate program where he would probably qualify for theological exemption. No request was made for ministerial student status, nor was pertinent supporting information presented. Petitioner refused to fill out a current information questionnaire sent to him on his graduation from college, announcing that he would not cooperate with the selective service system. Following the Local Board's subsequent reclassification of petitioner I–A, he did not seek a personal appearance before the board or appeal his case to the Board of Review. He refused to submit to induction for which, along with other draft law violations, he was prosecuted and convicted. The Court of Appeals, rejecting petitioner's defense that the Local Board had erred in its classification, affirmed the lower court's decision.

The Supreme Court, upon timely appeal, reasoned that McGee's failure to exhaust his administrative remedies jeopardized the interests of the Selective Service System as the administrative agency responsible for classifying registrants. Necessarily involved therein is the full gathering of facts and use of the system's expertise to assess a registrant's claims to exempt status. A registrant must comply with the regulations. Failure so to do thus bars petitioner's defense that he was erroneously classified. The Court discussed the "exhaustion of administrative remedies doctrine" in detail, and on page 483 of the opinion stated that:

> * * * "the doctrine when properly invoked operates to restrict judicial scrutiny of administrative actions having to do with the classification of a registrant, in the case of a registrant

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> who has failed to pursue normal administrative remedies, and thus has sidestepped a corrective process *which might have cured* or rendered moot the very defect later complained of in court." [emphasis supplied]

The Court then proceeded to discuss the case of *McKart* v. *U.S.*, 395 U.S. 185 (1969), wherein the registrant failed to take an administrative appeal from the Local Board's denial of "sole surviving son" status. When the issue of McKart's entitlement to exempt status was raised in criminal court, the court held that the claim should be heard as a defense to the charge despite "failure to exhaust." The Court's reasoning therein was that the validity of the claim was a question "solely * * * of statutory interpretation," and that failure to exhaust had not inhibited the making of an administrative record inasmuch as all the relevant facts had been presented. The issue, therefore, was not a factual issue which might have been properly determined had he exhausted the available administrative appellate procedure, but was a question of law—that of interpretation of a statutory provision.

In *McGee,* however, the Court found that McGee's failure to exhaust did "jeopardize the interest in full administrative fact gathering and utilization of agency expertise." As stated in *McKart,* "The Selective Service System and the courts may have a stronger interest in having the question decided in the first instance by the Local Board, and then by the Appellate Board, which considers the question anew." *McKart* v. *U.S.*, supra.

It is the Government's considered opinion that this case is not a case in which "entitlement to an exemption would be automatically made out, given a minimal showing by the registrant or minimal investigatory

effort by the Local Board." *McGee* v. *U.S.*, supra. Indeed, a close review of the information contained in defendant's selective service file, including the special form for conscientious objector status (SSS Form 150) clearly indicates that this is a claim for conscientious objector status which is dependent upon a careful factual analysis—an analysis that the defendant never gave the Appeal Board an opportunity to make. The Appeal Board classifies de novo, and might conceivably have determined that the record should have been supplemented by the Local Board. Where the issue involves a question of fact, the administrative procedure should be exhausted. If courts held otherwise, indeed, as indicated in *McGee,* the claimant might be tempted to circumvent further fact finding processes once conscientious objector status is denied at the Local Board level and take a chance at showing in court that the only administrative record available shows no basis for denial of the claim.

While the Local Board, in the instant case, erred in failing to list reasons for denial, this situation might have been remedied had defendant followed proper administrative procedures of which he had been advised. As hereinbefore noted, classification comes as the product of administrative action based upon factual considerations within the framework of the Selective Service law. Proper classification is dependent upon factual development. The Boards set up for that very purpose, under the provisions of the act, should make that determination. The Appeal Board, having the authority to hear these very matters de novo, is a part of the administrative machinery and its ultimate action on a registrant's claim is obviously contemplated under the Act. Here the defendant did not avail himself of the rights afforded him thereunder, and now cannot be heard to complain. A full development

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at the administrative level may or may not have established his entitlement to the status he sought. But, the government takes the position that the defendant was obligated to take that route before he can be heard to complain of the denial of such entitlement.

Accordingly, it is hereby ORDERED that defendant's Motion to Dismiss be and the same is hereby denied.

DENNIS R. KNAPP,
United States District Judge.

Dated at Charleston this 16th day of March 1972.

APPENDIX D

United States District Court Southern District of West Virginia, Beckley

Criminal Action No. 71-8 BK

UNITED STATES OF AMERICA

v.

ALLEN RAY KING

MEMORANDUM ORDER

Defendant was indicted for violation of the Universal Military Training Act for refusing to report for, and submit to, induction into the Armed Forces of the United States. On January 25, 1972, the defendant filed a motion to dismiss, which motion was denied by the Court in a memorandum opinion dated March 16, 1972. Subsequent thereto, the defendant renewed its motion to dismiss, which motion the court now has under consideration.

The aforementioned memorandum opinion of the Court summarizes the facts of the case and the Court deems it unnecessary to repeat them herein. The Court, in that opinion, based its decision on *McGee* v. *United States,* 402 U.S. 479 (1970). In the McGee case, the Supreme Court held that where the issue involves a question of fact rather than a question of law, the available administrative procedures should be exhausted. The Court indicated that if the courts held otherwise, the claimant might be tempted to circumvent further fact finding processes once conscien-

tious objector status is denied at the Local Board level and take a chance at showing in court that the only administrative record available shows no basis for denial of the claim.

In the instant case, the Local Board erred in failing to list reasons for denying the defendant conscientious objector status. The defendant failed to take any steps toward appealing his classification.

The defendant's motion is premised on the recent decision of the U.S. Court of Appeals for the 4th Circuit in the case of *U.S.* v. *Robert Dean Davis,* Criminal Action No. 71–1581. The Court, in that case, states that when an administrative appeal is taken from a 1–A classification; the registrant need only contest those reasons put forth by the draft board for its action in denying conscientious objector status. Apparently, the Court is of the firm opinion that the failure of the local board to cite reasons is fatal to a prosecution for failure to obey an order to report for induction which is the charge in the indictment in the instant case. The Court further reiterated its holding in *U.S.* v. *Broyles,* 423 F. 2d 1299 (4th Cir. 1970), requiring a local board to state the basis of a rejection of a conscientious objector claim where the registrant has established a prima facie case.

While the Court made no comment on the Supreme Court's opinion in *McGee* v. *U.S.,* supra, inasmuch as its opinion in the *Davis* case was issued subsequent to *McGee,* it would appear to be controlling in the instant situation.

Accordingly, it is hereby ORDERED that the indictment against Allen Ray King be, and the same is, hereby dismissed.

DENNIS R. KNAPP,
United States District Judge.

Dated at Charleston this 11th day of July, 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1973